INDEX

SUBJECT INDEX

	Page
Motion to Dismiss Writ of Certiorari	1
Brief in Support of Motion to Dismiss	2

TABLE OF CASES CITED

Pullman Palace Car Co. v. Harrison, 122 Ala. 149	3, 5, 8, 11
Douglas v. N. Y., N. H. & H. R. Co., 279 U. S. 377	4
Gordon v. Medders, 148 So. 135	5
Mondou v. N. Y., N. H. & H. R. Co., 223 U. S. 1	6
Quong Ham Wah Co. v. Industrial Accident Commission, 255 U. S. 445	7
Grand Gulf R. Co. v. Marshall, 12 How. 165	7
Des Moines Nat. Bank v. Fairweather, 263 U. S. 103	8
Supreme Lodge Knights of Pythias v. Meyer, 265 U. S. 30	8
American Railway Express Co. v. Royster Guano Co., 273 U. S. 274	8
Lee v. Baird, 139 Ala. 526	12

TABLE OF STATUTES CITED

Code of Alabama, 1923, Section 5681	2, 4
Code of Alabama, 1923, Section 9479	5

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 597

ROBERT J. MCKNETT, Petitioner

vs.

ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY

Respondent.

MOTION TO DISMISS WRIT OF CERTIORARI

Now comes the respondent and moves the Court to dismiss the writ of certiorari heretofore granted for want of jurisdiction, in this:

1. The decision of the Supreme Court of Alabama, sought to be reviewed, was concerned solely with the construction of a statute of the State of Alabama.

2. No objection was raised by petitioner in the trial court that said statute was in conflict with the Constitution of the United States.

3. The decision of the Supreme Court of Alabama did not determine the question of the validity, vel non, of said statute with reference to the Constitution of the United States.

4. Petitioner does not seek a determination of the constitutionality of the statute, but merely a review of its construction by the Alabama Court, to the end that a different construction be given it by this Court.

Forney Johnston,

Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 597

ROBERT J. MCKNETT, Petitioner

vs.

ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY
Respondent

BRIEF IN SUPPORT OF MOTION TO DISMISS

As is shown by the record, this petition for a writ of certiorari was granted by the Court without service of a copy of the petition, or other notice of its filing, upon counsel for respondent. Had counsel for respondent had notice of the filing of the petition, the objection to the jurisdiction of the Court could have been pointed out in a brief in opposition to the petition.

It is apparent that no Federal question is raised in this case.

The decision in this case, both in the trial court and in the Supreme Court of Alabama, turned upon the proper construction of a statute of Alabama, passed in 1907, and now codified as Section 5681 of the 1923 Code.

Prior to the passage of this act, it was the settled rule in Alabama that a foreign corporation could not be sued in Alabama, except on causes of action originating in the state, or on contracts entered into with reference to a subject matter within the state. The basis of the rule was that without legislative enactment, a foreign corporation could not be sued outside of the state of its domicil, because service of process must be had upon its principal officer within

the jurisdiction of the state of domicil, and service outside of such jurisdiction was not binding. Statutes enacted in Alabama provided for service of process upon agents of foreign corporations doing business in the state, but such statutes were construed as applying only to causes of action originating in the state, or on contracts entered into with reference to a subject matter within the state.

Pullman Palace Car Co. v. Harrison, 122 Ala. 149, 25 So. 697,

where it was said:

"Without legislative enactment, a foreign corporation could not be sued outside of the State of its domicil, for the reason there were no means provided by which service could be had upon it. By the common law, to maintain a personal action against a corporation there must have been service of process upon the principal officer within the jurisdiction of the sovereignty creating it. The officer upon whom, in the sovereignty of its creation, service could be legally had, binding the corporation, it may be could be found in another jurisdiction, but he was not regarded as carrying with him his official functions, and service upon him there would not bind the corporation.—St. Clair v. Cox, 106 U. S. 354; Sullivan v. Sullivan Timber Co., 103 Ala. 371. To meet and obviate this inconvenience and oftentimes injustice, the Legislature of this State has enacted statutes by which process may be served upon the agents of foreign corporations doing business in this State. We do not deem it important; to a correct decision of this case, to review these statues. They do not materially differ, for the purpose here involved, from those in existence when the case of Central Railroad & Banking Co. v. Carr, 76 Ala. 388, was decided by this court. In that case, the learned judge reviewed them at length and, after an exhaustive

> examination of cases decided by other courts, held, that a foreign corporation, though doing business in this State through its agents located here, could not be held liable by our courts for a tort committed by it in another State. We quote his conclusion in that opinion, as he there so aptly and tersely states the doctrine by saying: 'We cannot think that it was the intention of the legislature, in any of the statutes we have been considering, to allow foreign corporations to be sued in this State, except on causes of action originating in this State, or on contracts entered into in reference to a subject matter within this State. To hold otherwise would allow foreign corporations which transact business in Alabama to be drawn into our courts, for the adjudication of every tort and wrong they may be charged with committing, even in the State which gave them being."

Certainly no one could contend that this rule, applying to all foreign causes of action against all foreign corporations, constituted an unwarranted discrimination against claimants under a Federal act. (Douglas v. N. Y., N. H. & H. Co., 279 U. S. 377, 73 L. Ed. 747.)

This remained the rule in Alabama until the passage, in 1907, of the act in question (now Sec. 5681, Code 1923) which in substance provided that whenever a cause of action had arisen in another state under either the common law or statute of such state, such cause of action should be enforceable in Alabama. Following the passage of this act, the Supreme Court of Alabama held in several cases (cited in petitioner's supporting brief, p. 9 et seq.) that the act changed the former prevailing rule in that it authorized suits against foreign corporations upon causes of action arising outside of the state. But all of those cases were cases where the cause of action arose under the common law or the statutes of a sister state, and no case had

arisen requiring the Court to construe the statute with reference to whether it included causes of action arising under Acts of Congress.

In the present case the petitioner sought to enforce, in Alabama, a cause of action arising in Tennessee under an Act of Congress against respondent, a foreign corporation. Respondent pleaded in abatement that it was a foreign corporation, that the cause of action arose, not in Alabama, but in Tennessee, and that it did not arise under the common law or statutes of Tennessee, but under an Act of Congress. Thus respondent relied upon the common law rule in Alabama, (Pullman Palace Car Co. v. Harrison, supra); contending that the 1907 Act did not apply, because this action did not arise under the common law or statute of a sister state.

Petitioner demurred to the plea in abatement but no ground of the demurrer takes the point that the 1907 Act is violative of any of petitioner's constitutional rights or privileges, notwithstanding it has long been the statutory law of Alabama that "No demurrer in pleading can be allowed but to matter of substance, which the party demurring specifies; and no objection can be taken or allowed which is not distinctly stated in the demurrer," (Code, 1923, Sec. 9479), under which statutory rule it is necessary for the demurrer to point out the distinct constitutional objection. (Gordon v. Medders, 148 So. 135 (Ala. Sup.). It is clear that no question of the Constitutional validity of the 1907 Act was raised on the record.

Nor did the Supreme Court of Alabama in its opinion, determine the constitutional validity of the 1907 Act. The original opinion deals solely with the construction of the act, and the Court concludes, in substance, that the word "state" as used in the act means one of the American Com-

monwealth of states, does not include the United States, and consequently this case is not included in the 1907 Act, and the common law rule, prohibiting its maintenance in Alabama, prevails.

The opinion of the majority of the Court, on rehearing, likewise deals solely with the construction of the 1907 Act, and the construction placed on the act in the original opinion is adhered to. And the minority opinion, on rehearing, is concerned solely with construction. Apparently the dissenting Justices were of opinion that the act should be construed to include causes of action arising outside of Alabama under Acts of Congress against foreign corporations because "it would be unwarranted discrimination, ... unless the language of the law can have no other meaning." (R. p. 16). And the minority opinion concluding as follows, "For these reasons I cannot accept the theory that Section 5681, Code, does not here have effect," conclusively demonstrates that the minority opinion was concerned solely with the construction of the act.

Likewise the majority opinion on rehearing was concerned solely with construction. The opinion first reaffirms the construction given the act in the original opinion, saying: "Giving therefore to the words 'statute of another state' their natural meaning (and we find nothing upon which to base a contrary interpretation) a federal statute is excluded." The opinion then states the minority view, that the Federal Employers Liability Act and this Court's decision in the Second Employers Liability Act Cases (Mondou v. N. Y., N. H. & H. R. R. Co., 223 U. S. 1) should force the Alabama Court to so construe the 1907 Act as to include Acts of Congress. The Court then points out that the jurisdiction of the state courts is a state and not a federal matter, and discusses the Mondou and other cases

in demonstrating that there is nothing in those cases, or in the Federal Act, to force the Alabama Court to construe its own statute so as to include Acts of Congress. The opinion makes it clear that it is dealing only with the construction of the 1907 Act. It states (R, pp. 14-15):

> "We interpret the words of our statute, 'statutes of another state,' as meaning a statute or law directly passed by the legislature of the state. To hold, as indicated in the dissenting opinion, that anything in the federal act forces a contrary construction, is but to yield the State power to the federal power, when, as shown in the Mondou case, supra, Congress had no intention to invade such power.
>
> *"Our statute is plain and unambiguous, and we have given to the language its plain ordinary meaning. To accept a contrary construction merely because of the federal act would but amount to a surrender of the State power in the* (fol. 21) *matter of fixing the limitation of the jurisdiction of its courts. Congress had no such limitation and made no such effort. In the Mondou case, supra, local laws permitted the action, and the declination of the state court to entertain the suit merely because based on the federal statute was held to be an unwarranted discrimination by the Court; but that decision in no manner affects the instant case wherein this Court is engaged in no discrimination but only construing and enforcing its own statutory provisions."* (Italics supplied.)

Of course no federal question is raised by a state court's construction of its own statute. Such construction is controlling upon this Court, even though it may not agree with the construction given by the state court, and cannot be reviewed or revised on certiorari. (Quong Ham Wah Co. v. Industrial Accident Commission, 255 U. S. 445, 65 L. ed. 723, Grand Gulf R. Co. v. Marshall, 12 How. 165,

13 L. ed. 938, Des Moines National Bank v. Fairweather, 263 U. S. 103, 68 L. ed. 191, Supreme Lodge Knights of Pythias v. Meyer, 265 U. S. 30, 68 L. ed. 885, American Railway Express Co. v. Royster Guano Co., 273 U. S. 274, 71 L. ed. 642.)

Since the case here sought to be reviewed dealt solely with the proper construction of a state statute, and since such construction is solely a matter of state concern, it is submitted that no federal question is presented, and this Court has no jurisdiction.

Indeed, petitioner, both in his petition and in his brief, seeks to have this Court review the state court's construction of the statute, and not the question of its constitutionality. The specific relief sought is for this Court to interpret, construe, the 1907 Act as including suits under Acts of Congress. The reason petitioner is seeking review by construction, rather than on the constitutionality of the 1907 Act, is apparent, because in the event the 1907 Act is declared unconstitutional, then the common law rule will still prevail (Pullman Palace Car Co. v. Harrison, supra) and neither petitioner nor any other claimant having a cause of action arising outside of Alabama against a foreign corporation, whether under the laws of a state, or under an act of Congress, can enforce such action in Alabama. In short, whether the act is constitutional or otherwise, petitioner's case is not bettered, for in the absence of the act, he could not enforce this cause of action in Alabama (since it arose outside of Alabama against a foreign corporation), nor can he enforce it under the act, (since the act includes only causes of action arising under the common law or statute of a sister state). So petitioner can only rely upon the insistence that the Alabama Court erred in construing the act as not including causes of action arising outside of Ala-

bama under Acts of Congress under foreign corporations, —obviously a state matter with which this Court is not concerned.

That petitioner seeks to review the construction of the act is made clear by his statement of the question under the heading "Summary Statement of the Matter Involved" on page 2 of the petition, where it is stated:

"In fine, in its construction of a State statute (Section 5681, Code of Alabama of 1923), providing that:

> 'Whenever, either by common law or the statutes of another state, a cause of action, either upon contract or in tort, has arisen in such state against any person or corporation, such cause of action shall be enforcible in the courts of this state, in any county in which jurisdiction can be legally obtained in the same manner in which jurisdiction could have been obtained if the cause of action had arisen in this state,'

the State court of last resort has concluded that while the quoted statute required a determination of causes of action arising under the common law or statute of any other State, no such requirement existed as to suits arising under an act of the Congress, and therefore jurisdiction below was denied."

Likewise the "Specification of Errors" on page 8 of petitioner's supporting brief fail to raise a federal question, since the first specification is based on the trial court's action in overruling demurrer to the plea in abatement and no ground of demurrer raised any constitutional question, and the remaining specification is, in substance, that the trial court erred in construing the 1907 act as not including acts of Congress.

If there were any doubt that petitioner is merely seeking a construction by this Court of an Alabama statute con-

trary to the construction placed on it by the Alabama Court, it is removed by petitioner's statement of the question on page 8 of his supporting brief as follows:

> "There is solely presented the construction of a State statute by the Court below. We assert that the conclusion reached was erroneous because it was not in accord with the applicable decisions of this Court."

We fully agree that the sole question presented is the construction of a State statute by the Court below. We do not agree that the construction was erroneous, but whether erroneous or correct presents no federal question. Certainly no one has ever supposed that the decisions of this Court can force the Alabama Court to adopt a different construction of its own statute, or give this Court jurisdiction to declare a different construction, as sought by petitioner. The statute as construed is either valid or unconstitutional, but this question is not raised by petitioner, and, as pointed out, cannot be raised by petitioner. Petitioner does not seek to have this Court declare the statute unconstitutional. He seeks solely to have the Court hold that the Alabama Court erred in construing the statute, and to have this Court give a different construction to the statute. Certainly this Court accepts the construction of the statute given it by the Alabama Court, and has no jurisdiction to give the statute a different construction.

Since the question of the constitutionality of the 1907 Act is not raised or urged by petitioner, no occasion arises for a discussion of same. But we take the opportunity of pointing out that a fundamental error pervades petitioner's entire contention, which error is the assumption that the jurisdiction of the Alabama courts "as prescribed by local laws, is appropriate to the occasion," (Petition, pp. 1-2).

And elsewhere (supporting brief, p. 11) petitioner assumes that it is the judicial policy of Alabama to entertain all actions arising outside the state against foreign corporations. But we have pointed out that such is not the case. Prior to the 1907 act, it was the judicial policy of Alabama to decline to entertain foreign causes of action against foreign corporations. That judicial policy was changed by the 1907 act as to those cases governed by the act, namely, foreign causes of action arising under the common law or statute of a sister state. As to other foreign causes of action the judicial policy remained unchanged. Therefore the jurisdiction of Alabama courts, as prescribed by local laws, was not appropriate to the occasion of enforcing the present cause of action. Petitioner argues in circles when he first assumes that the jurisdiction of the Alabama court is appropriate to enforcing all foreign causes of action against foreign corporations, no matter under what law they arose, and then urging that the Alabama court erred in construing the very statute that extended jurisdiction over some foreign causes of action against foreign corporations, which error, (so petitioner argues) was in failing to hold that the statute extended the jurisdiction to all foreign causes of action against foreign corporations, no matter under what law they arose.

It may be mentioned, in passing, that the statute does not deny jurisdiction in this action because the action arose under an Act of Congress, but because the jurisdiction of the Alabama Court does not extend to such a foreign cause of action against a foreign corporation. If the action had arisen in Alabama it would have been enforced. Or if the action, though arising in Tennessee under the Federal Act, had been against a domestic corporation, or an individual operating the railroad, it would have been enforced in Alabama, for the rule in Pullman Palace Car Co. v. Harrison

(supra) is applicable only to foreign corporations. Lee v. Baird, 139 Ala. 526.

In any event, it is clear that no federal question is here presented. The Alabama court did not decline jurisdiction because the action arose under an Act of Congress, but merely construed its own statute. The constitutionality of the statute is not raised on the record, and was not determined by the Court below in its opinion. Petitioner does not seek to have the Court declare the statute unconstitutional. He simply seeks to have this Court review the construction given the statute, to the end that this Court shall give a different construction to the statute. But the construction of the statute is a matter of state concern, and this Court will not review such construction, or place a different construction on the statute. No federal question is raised, and this Court has no jurisdiction.

It is respectfully submitted that the certiorari should be dismissed.

Forney Johnston,

Counsel for Respondent.